90-1 31

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

FEDERAL ENERGY REGULATORY COMMISSION, PETITIONER

v.

COLUMBIA GAS TRANSMISSION CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In this case, the Federal Energy Regulatory Commission found "good cause" to waive the notice requirement in Section 4(d) of the Natural Gas Act, 15 U.S.C. 717c(d), and permitted natural gas pipelines to pass through to downstream customers, based on their past purchases of gas, various costs that the pipelines themselves had been required to pay producers for their purchase of the same gas.

The question presented is:

Whether notwithstanding the Commission's waiver, the Commission's approval of this direct billing of customers for past sales constitutes impermissible retroactive ratemaking.

PARTIES TO THE PROCEEDINGS

In addition to the Federal Energy Regulatory Commission, the parties in the court of appeals were:

Atlanta Gas Light Company
CNG Transmission Corporation
Columbia Gas Transmission Corporation
General Service Customer Group and Panhandle Customer Group
Indiana Gas Company
Kansas Power & Light Company
Michigan Consolidated Gas Company
Municipal Defense Group
Panhandle Eastern Pipe Line Company
Philadelphia Electric Company
Philadelphia Gas Works
Process Gas Consumers Group
Public Service Electric and Gas Company
Texas Gas Transmission Corporation
Transcontinental Gas Pipe Line Company
Trunkline Gas Company
UGI Corporation
Washington Gas Light Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Acting Solicitor General, on behalf of the Federal Energy Regulatory Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (89-2001 Pet. App. 1a-14a)[1] is reported at 895 F.2d 791. The court's prior opinion (Pet. App. 42a-56a) and order denying rehearing (Pet. App. 57a-59a) are reported at 831 F.2d 1135 and 844 F.2d 879. The orders of

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[1] "89-2001 Pet. App." [hereinafter "Pet. App."] refers to the appendix to the petition for a writ of certiorari in *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001 (filed June 22, 1990), which seeks review of the same judgment of the court of appeals.

the Federal Energy Regulatory Commission (Pet. App. 17a-41a) are reported at 45 F.E.R.C. ¶ 61,169, 46 F.E.R.C. ¶ 61,066, 44 F.E.R.C. ¶ 61,173, and 44 F.E.R.C. ¶ 61,418.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1990, and a petition for rehearing was denied on April 19, 1990. App., *infra*, 1a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 4 and 5(a) of the Natural Gas Act, 15 U.S.C. 717c and 717d(a), are reproduced at App., *infra*, 2a-5a.

STATEMENT

This case involves the validity of orders of the Federal Energy Regulatory Commission permitting natural gas pipelines to charge their downstream customers for certain costs that the pipelines were required to pay producers for past sales of gas. The Commission's orders found "good cause" for waiving the notice requirements in Section 4(d) of the Natural Gas Act (NGA), 15 U.S.C. 717c(d), and permitted the pipelines to bill those costs directly to their downstream customers based on the customers' past purchases. Notwithstanding the Commission's waiver, the court of appeals held that such direct billing constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." This case therefore presents issues similar to those presented in *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016 (filed June 22,

1990), in which we seek review of another D.C. Circuit decision holding that a Commission order impermissibly permitted a retroactive rate increase, in violation of the filed rate doctrine. We accordingly suggest that the instant petition be held and disposed of in light of *FERC* v. *Associated Gas Distributors*.

A. Statutory and Regulatory Background

1. Title I of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, established ceiling prices for "first sales" (typically wellhead sales by producers) of most categories of natural gas. Section 110(a) of the NGPA authorizes producers to charge above the NGPA ceiling price to the extent necessary to recover certain "production-related" costs that they incur after the gas has been brought to the wellhead—specifically, "[a]ny costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission." 15 U.S.C. 3320(a). Section 601 of the NGPA, 15 U.S.C. 3431, assures pipelines that they will be permitted to pass through to their downstream customers these and other costs they pay producers for gas. It provides that "any amount paid in any first sale of natural gas shall be deemed to be just and reasonable if * * * such amount does not exceed the maximum lawful price," and "[t]he Commission may not deny any interstate pipeline recovery of any amount paid with respect to any purchase of natural gas * * * [that is] deemed to be just and reasonable." 15 U.S.C. 3431(b)(1)(A) and (c)(2)(A).

2. Upon enactment of the NGPA in 1978, the Commission issued interim regulations allowing first

sellers to apply for recovery of certain production-related costs. 43 Fed. Reg. 56,448, 56,575-56,577 (1978). On July 25, 1980, the Commission issued Order No. 94, 45 Fed. Reg. 53,099, which liberalized recovery of certain production-related costs but imposed a moratorium on applications to recover costs of gathering and compressing gas, pending completion of rulemaking proceedings to fix the allowable charge for those costs on a generic basis. The Commission found the generic approach necessary because case-by-case assessment of gathering and compression costs would be administratively unworkable. *Id.* at 53,107-53,108. However, the Commission assured sellers that "a retroactive collection procedure will be provided under which the allowance for compression costs determined under the generic rulemaking will be applied to costs incurred with respect to gas delivered on or after the effective date of this Rule if collection of such costs is contractually authorized." *Id.* at 53,107. The Commission likewise stated that "a retroactive collection procedure will be provided" for gathering costs. *Id.* at 53,108. See Pet. App. 3a-4a, 18a n.4, 46a-47a.

3. On March 7, 1983, the Commission prescribed allowances for gathering and compression costs (48 Fed. Reg. 5180 (1983); 18 C.F.R. 1104(d)(1)) and issued Order No. 94-A, which permitted producers to collect those costs on a retroactive basis from the pipelines that were their customers during the 1980-1983 period. 48 Fed. Reg. 5152 (1983); 18 C.F.R. 271.1104(e).[2] Many pipelines sought judicial review

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[2] In Order No. 94-B, 48 Fed. Reg. 5190 (1983), the Commission allowed recovery of certain production-related costs by sellers of gas under intrastate contracts covered by Sections 105 and 106(b) of the NGPA, 15 U.S.C. 3315, 3316(b).

of Orders Nos. 94 and 94-A in the United States Court of Appeals for the Fifth Circuit, which sustained the Orders in relevant part in *Texas Eastern Transmission Corp.* v. *FERC*, 769 F.2d 1053 (1985), cert. denied, 476 U.S. 1114 (1986). The Fifth Circuit found that the retroactive collection procedure was based on "a fair balancing of the various problems involved: the sellers' need for allowances, the purchasers' need for notice, and the Commission's need to make a thorough study prior to setting allowances." 769 F.2d at 1066.

B. The Proceedings In This Case

1. After (and, in one instance, prior to) the Fifth Circuit's decision in *Texas Eastern*, producers began to collect the past costs from the pipelines with which they had contracts. Some pipelines in turn began to recover those costs from their downstream customers through "Purchased Gas Adjustment" (PGA) accounts. See 18 C.F.R. 154.301-154.311.[3] Although the costs had been incurred for past deliveries, the PGA approach required that they be collected prospectively as part of the price of gas the pipelines sold in 1985 and later. Pet. App. 4a, 19a & n.5.

The PGA approach, however, presented significant problems, because many pipelines no longer sold the

[3] Under the PGA mechanism, a pipeline projects gas costs for the upcoming six-month period. At the end of each such period, the pipeline determines the difference between what it paid and what it received for gas and then adds or subtracts that difference to the price charged for gas sold in the next six months. The PGA mechanism allows pipelines to charge a commodity rate that reflects a current estimate of the future cost of gas, modified by a surcharge for previous under- or over-collections. See, *e.g.*, *El Paso Natural Gas Co.* v. *FERC*, 677 F.2d 22, 23 (5th Cir. 1982).

same volumes of gas—or no longer sold to the same customers in the same proportions—as they had between 1980 and 1983. These changes were largely due to the Commission's intervening issuance of Order No. 436 in 1985 (FERC Stats. & Regs., Regulation Preambles ¶ 30,665), which "envisage[d] a complete restructuring of the natural gas industry" by changing the principal role of pipelines from merchants that purchased gas from producers and resold it to downstream customers, to transporters of gas that was bought and sold by others. *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988) (*AGD I*). Under Order No. 436 and related measures, many previously "captive" customers of pipelines were able to purchase gas from others and still use their former pipeline suppliers for transportation.[4] As a result, the PGA passthrough approach would not necessarily allow pipelines to recover gathering and compression costs from the customers on whose behalf those costs had been incurred between 1980 and 1983. Moreover, if the pipelines added these past costs to their current sales rates, the higher rates would send erroneous market signals and cause even more downstream customers to purchase gas elsewhere. Pet. App. 64a-66a.

In response to this new market and regulatory climate, five pipelines that had been billed a total of more than $500 million for the past gathering and compression costs incurred by producers petitioned the Commission to allow recovery of those costs by "di-

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[4] We describe the relevant regulatory and market changes in greater detail in our certiorari petition (at 4-9) in *FERC* v. *Associated Gas Distributors*, No. 89-2016.

rect billing" of their downstream customers.[5] Under that approach, the pipelines would allocate the payments they made to each producer among their customers in proportion to the customers' actual purchases of that producer's gas during the prior period. Pet. App. 4a-5a, 19a, 48a-49a. In a series of orders issued in 1985 and 1986, the Commission granted the pipelines' applications. *Id.* at 60a-142a.

2. On judicial review at the behest of a number of downstream customers, the D.C. Circuit set aside the Commission's orders approving the pipelines' "direct billing" applications. Pet. App. 42a-56a (*Columbia I*). The court held that the orders amounted to retroactive ratemaking, in violation of the "filed rate doctrine," because "downstream purchasers are expected to pay a surcharge, over and above the rates on file at the time of sale, for gas they already purchased." *Id.* at 51a. The court concluded that while this "prohibition [against retroactive rate increases] might have been overridden through adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date," Order No. 94 was "addressed exclusively to *first sales* of natural gas" and therefore "cannot be deemed to have placed downstream purchasers on notice that they in turn would be expected to absorb these costs through a system of surcharges collected after the fact." *Ibid.*

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[5] The costs billed to the pipelines were approximately $163 million for Transcontinental Gas Pipe Line Corporation (Transco), $136 million for Texas Eastern Transmission Corporation, $105 million for Trunkline Gas Company, $95 million for Texas Gas Transmission Corporation, and $20 million for Panhandle Eastern Pipe Line Company (Panhandle).

The court made clear on rehearing that the Commission was free on remand to consider whether it had the authority to approve the pipelines' direct billing applications by waiving the notice requirement under Section 4(d) of the NGA, 15 U.S.C. 717c(d). Section 4(d) provides that "[u]nless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate * * * except after thirty days' notice to the Commission and the public," and that "[t]he Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for."

3. On remand, the Commission found that the pipelines' applications satisfied the "good cause" standard in Section 4(d). It therefore waived the notice requirement in Section 4(d) and permitted the pipelines to place the rate increase in effect as of 1980 and to recover the increase by directly billing their customers that purchased gas during the 1980-1983 period. Pet. App. 17a-26a. The Commission acknowledged that prior waivers permitting a rate change to be given effect as of a date prior to the filing of the rate change with the Commission had been granted to "implement[] the parties' intention as expressed in their private contracts." *Id.* at 24a. But the Commission concluded that "good cause" for a waiver may also be found where, as here, it arises "in the context of the overriding public interest in orderliness of the nation's natural gas markets and the ultimate benefit to gas consumers which would thereby result." *Ibid.* The Commission explained (*id.* at 22a-23a):

> Under these [direct billing] procedures, pricing signals are not distorted by the influx of sub-

stantial retroactive Order No. 94-A costs. Furthermore, these procedures equitably bill customers for the higher amounts they should have paid for gas based on actual purchases during the past billing periods and more accurately allow the true cost of current gas supplies to be reflected in the pipelines' PGAs. * * *

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[A]bsent waiver, many of those customers who used the gas during the 1980 to 1983 period will not pay these compression and gathering costs. Instead, current customers will pay these costs for those former customers. Equity and the public interest demand that these costs be both recovered by the pipelines and fairly allocated by the pipelines to those who benefitted from the activities by which the costs were incurred.

The Commission further observed that many downstream customers, like respondent Columbia Gas Transmission Corporation, were "fully cognizant" from their own participation in proceedings on Order No. 94 that "they were not paying the full cost of the gas volumes they in turn purchased from the pipelines." *Id.* at 24a-25a.

4. The D.C. Circuit set aside the Commission's order. Pet. App. 1a-14a.[6] The court acknowledged

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[6] In the consolidated proceedings below, the court of appeals also set aside a separate Commission order authorizing Panhandle to direct bill its customers for $17 million in certain other production-related costs that had been allowed by Orders Nos. 473 and 473-A (FERC Stats. & Regs., Regulation Preambles ¶¶ 30,747, 30,788 (1987)) and paid by Panhandle to a producer on a retroactive basis. Pet. App. 7a-8a, 14a, 33a-40a. Orders Nos. 473 and 473-A were recently affirmed in part and reversed in part in *Phillips Petroleum Co.* v. *FERC*, 902 F.2d 795 (10th Cir. 1990).

that "[t]he Commission may well be correct in its assessment of the equities here involved and of the distortion in market signals that may result from the allocation of $1.5 billion in prior production costs to current sales." *Id.* at 13a. The court also acknowledged that in *City of Piqua* v. *FERC*, 610 F.2d 950 (1979), it had sustained a Commission waiver that permitted a rate increase to take effect as of a date prior to the filing of the rate change with the Commission, and that the Fifth Circuit had ordered the Commission to grant a similar waiver. Pet. App. 11a, citing *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983). And, finally, the court did not question the authority of the Commission in this case to waive the *statutory* notice requirement in Section 4(d) to the extent necessary to allow the rate change to be given effect as of 1980. But it nevertheless held that the Commission's order approving the direct billing mechanism was invalid because the Commission failed to comply with what the court found to be an additional, non-statutory notice requirement that it derived from its first decision in this case, *Columbia I*.

In the court of appeals' view, "th[e] statutory notice [required by Section 4(d)], which the Commission may waive on a showing of good cause, is not the notice of prospective rate adjustments to which [the court] referred in *Columbia I* when [it] stated that the NGA's prohibition against retroactive rate increases might have been overridden if FERC had provided 'adequate notice that [downstream] purchasers would be expected to pay the deferred charges at a later date.' " Pet. App. 10a, quoting *id.* at 51a. "That statement," the court continued, "was addressed to those circumstances in which the Commission has authorized increases in prices previ-

ously paid by purchasers who were already on notice that the prices they were paying were provisional only." *Id.* at 10a-11a.

The court distinguished its prior decision in *City of Piqua* on this basis. There, an electric utility and a town had agreed to a higher rate, but the utility's filing of the rate change with the Commission was delayed pending approval of the new contract by the city council.[7] *City of Piqua* sustained the Commission's waiver of the statutory notice requirement to allow the rate change to become effective on the date specified in the contract, which was prior to the date of the utility's filing. 610 F.2d at 952-954. It also rejected the city's objection that the effect of the order was to allow retroactive ratemaking, reasoning that the rate change "was prospective from the date of the contract." 610 F.2d at 954. The court similarly distinguished the Fifth Circuit's decision in *Hall* v. *FERC* on the ground that it gave effect to the contract between the parties. See Pet. App. 11a.

Here, the court reasoned, there was no "preexisting agreement[] between the parties and the notice that went automatically with [it]," nor had "the Commission itself place[d] parties on notice (as it did the first sellers and first buyers of natural gas in Order No. 94) that the rates they [were to] be paying [would] subject to retroactive adjustment at a later date." Pet. App. 12a-13a. In the court's view,

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[7] *City of Piqua* arose under Section 205(d) of the Federal Power Act (FPA), 16 U.S.C. 824d(d), which requires 60-days' notice. But as *City of Piqua* recognized, 610 F.2d at 953 n.10, because the relevant provisions of the two Acts are otherwise "substantially identical," decisions arising under those provisions of the two Acts may be cited interchangeably. *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 n.7 (1981).

the absence of such notice meant that the rates were retroactive and could not be allowed.

REASONS FOR GRANTING THE PETITION

The court of appeals invalidated orders of the Federal Energy Regulatory Commission that allocated in an equitable manner more than $500 million in costs incurred by producers in gathering and compressing gas during a time when the Commission had imposed a temporary moratorium on applications to recover such costs. The Commission made clear when it imposed the moratorium in July 1980 that producers would be permitted to recover those costs from pipelines on a retroactive basis, upon completion of rulemaking proceedings to establish the appropriate rates on a generic basis. The Commission's orders in this case allow the pipelines to allocate the past costs among the downstream customers on whose behalf they were incurred while the rulemaking was pending. The pipelines' downstream customers had no reasonable expectation in 1980 that they would be able to avoid ultimate responsibility for those costs. The Commission's approval of direct billing is consistent with the customers' expectations, taking into account the substantial intervening changes in the regulatory regime and the natural gas market.

By contrast, the court of appeals' decision setting aside the Commission's orders will require the pipelines to attempt to charge the past costs to their future customers, thereby creating substantial inequities and market distortions and departing from the standard ratemaking principle that customers should bear costs incurred for their benefit. Moreover, the higher sales rates will render the pipelines' sales rates less competitive and thus could accelerate their

loss of sales customers. If, for this reason, the pipelines were unable to pass the costs on in their future sales, the costs would be "trapped" with the pipelines (compare *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 970 (1986)), thereby undermining the policy of Section 601 of the NGPA generally permitting pipelines to pass on the costs they incurred in purchasing gas.

The D.C. Circuit nonetheless held that the direct billing mechanism constitutes impermissible retroactive ratemaking, in violation of the "filed rate doctrine." In reaching that conclusion, the court applied essentially the same view of the filed rate doctrine and retroactive ratemaking as it did in *Associated Gas Distributors* v. *FERC*, 893 F.2d 349 (1989) (*AGD II*). We have filed a petition for a writ of certiorari to review the D.C. Circuit's decision in the *AGD II* case, see *FERC* v. *Associated Gas Distributors*, No. 89-2016 (filed June 22, 1990), and a number of other parties have filed certiorari petitions seeking review in *AGD II* as well.[8] We therefore suggest that the instant petition be held and disposed of as appropriate in light of the Court's disposition of the certiorari petitions filed in *AGD II*.

1. a. Although the statutory text can be read to suggest that the Commission's waiver authority allows it to do no more than shorten or eliminate the 30-day notice period before rates filed with the Commission may take effect, the courts that have consid-

[8] See *Berkshire Gas Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1988 (filed June 21, 1990); *Tennessee Small General Service Customer Group* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1989 (filed June 21, 1990); *Tennessee Gas Pipeline Co.* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-1990 (filed June 21, 1990).

ered the question, including the court below, have uniformly sustained the Commission's authority to grant a waiver under Section 4(d) of the NGA (or Section 205(d) of the FPA) that permits a rate increase to be given an effective date prior to when the increase was filed with the Commission. See *City of Piqua* v. *FERC*, 610 F.2d 950 (D.C. Cir. 1979); *Hall* v. *FERC*, 691 F.2d 1184 (5th Cir. 1982), cert. denied, 464 U.S. 822 (1983);[9] *Towns of Concord & Wellesley* v. *FERC*, 844 F.2d 891, 896-897 (1st Cir. 1988).[10] Although the waivers in those three cases

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[9] Prior to the Fifth Circuit's decision in *Hall* v. *FERC*, this Court had held in *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981), that a state court could not award damages to the producer for breach of contract based on the pipeline's failure to pay the higher price to which the producer claimed it was entitled under the "most favored nation" clause of the contract as a result of the pipeline's purchases at a higher price from another producer. The Court held that such a damage award would violate the filed-rate doctrine, since the lower rate paid by the pipeline was on file with the Commission when the sales were made. The Court noted that the producer had requested the Commission to waive the filing requirements of the NGA to permit it to recover a damage award calculated on the basis of the rates it believed should have been in effect for past sales. And the Court observed that "[a]lthough the Commission may not *impose* a retroactive rate alteration," it has the authority under Section 4(d), for good cause shown, to "waive the usual requirement of timely filing of an alteration in a rate." 453 U.S. at 578 n.8. But "[a]ssuming, *arguendo*, that waiver is available for retroactive collection of a higher rate than the one on file," the Court pointed out that at the time of the decision in *Arkansas Louisiana Gas Co.* v. *Hall*, the Commission had denied that waiver request and the denial was pending on judicial review in the Fifth Circuit in *Hall* v. *FERC*. 453 U.S. at 578 n.8; *id.* at 576 n.6.

[10] That was the contemporaneous interpretation by the Federal Power Commission immediately after passage of the

were found to be justified on the ground that they were linked to an agreement between the parties, Section 4(d) of the NGA makes no mention of that factor and thus does not suggest that the existence of an agreement is a necessary condition for the Commission's exercise of its power to grant a waiver. The only condition is "good cause shown."

Accordingly, if (as *City of Piqua, Hall* and *Towns of Concord & Wellesley* held) the Commission may grant a waiver of the statutory notice requirement under Section 4(d) to permit a prefiling effective date where there is an agreement between the parties, it follows from the text of Section 4(d) that the Commission has the power to do so in other circumstances as well, where the requisite "good cause" is shown. Moreover, the Court recently reiterated in *Maislin Industries, U.S., Inc.* v. *Primary Steel, Inc.*, No. 89-624 (June 21, 1990), that parties cannot by contract defeat the filed rate doctrine (as set forth in the tariff scheme of the Interstate Commerce Act). A logical corollary to that ruling is that a specific agreement is not a necessary condition for waiver of the notice component of the filed rate doctrine (as set forth in Section 4(d) of the NGA). On that premise, the Commission concluded in this case that despite

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FPA in 1935 and the NGA in 1938. See 18 C.F.R. 54.3(e) (1939) (NGA) ("For good cause shown, the Commission may by order provide that any rate schedule [or] charge * * * shall be effective as of a date prior to the date of filing"); 18 C.F.R. 35.3(e) (1939) (FPA) (same). Current FPA regulations expressly allow a pre-filing effective date. 18 C.F.R. 35.11. The parallel provision was deleted from the NGA regulations when they were revised in 1948, 13 Fed. Reg. 6838, albeit without any indication of an intention to eschew that authority under the generally applicable waiver provisions, 18 C.F.R. 154.22 and 154.51.

the absence of an agreement calling for higher rates, considerations of equity and cost-causation constituted "good cause" for granting a waiver under Section 4(d), especially in light of the Commission's own assurances of retroactive recovery and the substantial regulatory changes that intervened.

b. It is important to recognize that the D.C. Circuit in this case did not hold that the Commission's action was prohibited by anything in Section 4(d). To the contrary, the court acknowledged that its prior decision in *City of Piqua* sustained a Section 4(d) waiver permitting a pre-filing effective date. Pet. App. 10a-11a. Rather, the decision below invalidated the direct billing approved by the Commission because the Commission had not given a distinct, *extra-statutory* form of notice to downstream customers in 1980 that they might be billed an additional amount at a later date to cover gathering and compression charges incurred in producing the gas they were then purchasing. That additional notice was necessary, the court held, in order to prevent the subsequent rate increase from being impermissibly "retroactive." The court did not, however, identify the source of the prohibition against retroactive rates that it invoked. Instead, as it did in *AGD II* (see 89-2016 Pet. 13-15, 18-19, 21-25; 89-2016 Pet. App. 6a-11a), the D.C. Circuit treated the "filed rate doctrine" and its presumption against retroactive rates as if they were judicially fashioned principles that can be expanded by the courts in a common-law manner, rather than merely the labels given certain statutory provisions that govern the filing and fixing of rates.

As we explain in our certiorari petition in *AGD II* (at 21), the NGA in fact contains two provisions addressing retroactive rate changes. First, where the

Commission initiates an inquiry into the reasonableness of rates that are already on file, it has the power to "determine the just and reasonable rate * * * to be *thereafter* observed and in force, and shall fix the same by order." 15 U.S.C. 717d(a) (emphasis added). Because of this limitation in Section 5(a), the Commission "may not *impose* a retroactive rate alteration and, in particular, may not order reparations." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. at 578 & n.8. The rate increase in this case, however, was not ordered by the Commission under Section 5(a). It was requested by the pipelines under Section 4.

In contrast to Section 5(a), Section 4 does not state that the Commission may approve only those rate changes filed by a pipeline that are to be "thereafter observed and in force." Rather, the general rule against retroactive rate increases initiated by a natural gas company is contained in Section 4(d)'s provision that unless the Commission otherwise orders, no rate increase filed by a gas company may take effect without 30 days' notice to the Commission and the public. As noted above, the D.C. Circuit and other courts have held that the Commission may exercise its waiver authority under Section 4(d) not simply to shorten the 30 days' notice period, but to permit a rate change to be given an effective date prior to when it was filed with the Commission. See page 14, *supra*. Under this construction, where, as here, the Commission finds good cause to exercise its waiver authority in Section 4(d) to permit a prefiling effective date, the only bar in Section 4—and therefore the only bar anywhere in the NGA—to a retroactive rate increase initiated by a pipeline is lifted.

The D.C. Circuit, by contrast, was of the view in the decision below and its prior decision in this case (*Columbia I*) that the NGA's prohibition against retroactive rates exists independently of Section 4(d), and it then fashioned its extra-statutory notice requirement to enforce that unanchored prohibition. Pet. App. 10a-15a, 52a-53a. The court was thus led far astray. It seemed to believe that if the downstream customers had been given adequate notice in 1980, a subsequent rate increase by the pipelines (by means of direct billing) would not have been retroactive at all. But that is not true: the increase would have been retrospective in at least one respect that seems especially relevant for purposes of the filed rate doctrine, because it still would have applied to sales made prior to the date the rate change was filed with the Commission. For this reason, contrary to the D.C. Circuit's view in the decision below and *Columbia I*, the relevant question here is not whether the downstream customers had sufficient notice (of a sort not mentioned anywhere in the NGA) that the rates they were paying between 1980 and 1983 might later be adjusted. The question is whether anything in Section 4(d) of the NGA precludes the Commission's action. As noted, the D.C. Circuit did not rest its decision on any finding that the Commission lacked "good cause" under Section 4(d) or that Section 4(d) absolutely prohibited making rates effective prior to the filing date.

2. Although the decision below is of substantial practical importance and rests on a fundamentally mistaken view of the filed rate doctrine, we do not urge the Court to grant plenary review. The D.C. Circuit in this case followed essentially the same analytical approach as it did in *AGD II*. There, the court likewise treated the filed rate doctrine and its

retroactivity component as if they were judicially fashioned rules that could be further shaped by the courts according to their own perception of the rules' underlying purposes, divorced from the text and purposes of the NGA. Indeed, in *AGD II*, the D.C. Circuit relied extensively on its first decision in the instant case (*Columbia I*) in articulating its vision of the filed rate doctrine and the extra-statutory notice requirement, upon which it then relied in invalidating the Commission's order allocating take-or-pay costs among downstream customers. See 89-2016 Pet. App. 6a-11a. *AGD II* and the instant case also are closely related in practical terms, because both involve the allocation of costs by pipelines in the wake of the massive restructuring of the natural gas market that has occurred over the past decade as a result of Acts of Congress, administrative measures, and economic forces.

If, as we urge, the Court grants certiorari in *AGD II* and reverses the D.C. Circuit's decision in that case on the ground that it was not rooted in the text of the specific provisions of the NGA (including Section 4(d)) that comprise the "filed rate doctrine," that disposition will further highlight the essentially identical errors by the D.C. Circuit in this case. If the Court then vacates the judgment below in this case and remands for further consideration in light of *AGD II*, it will be clear to the D.C. Circuit on remand that the NGA's only prohibition against retroactive rates in a case such as this is contained in Section 4(d). Under that court's precedent in *City of Piqua*, sustaining the Commission's authority in appropriate circumstances to permit a rate increase to take effect prior to when it was filed by granting a waiver under Section 4(d), the D.C. Circuit then would be required to review the Commission's deter-

mination that there was "good cause shown" for such a waiver in this case.

For the foregoing reasons, *AGD II* will shed considerable light on the appropriate disposition of this case. We therefore suggest that the instant petition for a writ of certiorari be held and disposed of as appropriate in light of the Court's disposition of the petitions filed by the Commission and others parties in the *AGD II* case.

CONCLUSION

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's disposition of the petition for a writ of certiorari in *FERC* v. *Associated Gas Distributors*, petition for cert. pending, No. 89-2016, and the other certiorari petitions seeking review of the judgment of the District of Columbia Circuit in that case (see note 8, *supra*).[11]

Respectfully submitted.

JOHN G. ROBERTS, JR.
Acting Solicitor General *

WILLIAM S. SCHERMAN
General Counsel
Federal Energy Regulatory Commission

JULY 1990

[11] For the same reason, the certiorari petition filed by the pipelines seeking review of the D.C. Circuit's decision in the instant case, *Panhandle Eastern Pipe Line Co.* v. *Columbia Gas Transmission Corp.*, No. 89-2001, should also be held and disposed of as appropriate in light of *FERC* v. *Associated Gas Distributors*, No. 89-2016, and related cases.

* The Solicitor General is disqualified in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-1701

COLUMBIA GAS TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent

AND CONSOLIDATED CASES

[Filed Apr. 19, 1990]

ORDER

Before: BUCKLEY, D.H. GINSBURG and SENTELLE, Circuit Judges.

Upon consideration of the Petition for Rehearing of the intervenor pipelines, it is

ORDERED, by the Court, that the Petition is denied.

Per Curiam

For the Court:

CONSTANCE L. DUPRE, CLERK

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

APPENDIX B

STATUTORY PROVISION INVOLVED

1. Section 4 of the Natural Gas of 1938, 15 U.S.C. 717c, provides:

Rates and Charges

(a) **Just and reasonable rates and charges**

All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) **Undue preferences and unreasonable rates and charges prohibited**

No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) **Filing of rates and charges with Commission; public inspection of schedules**

Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such

form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) **Changes in rates and charges; notice to Commission**

Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) **Authority of Commission to hold hearings concerning new schedule of rates**

Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission, or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, with-

tion of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas out answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expira-

company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

2. Section 5(a) of the Natural Gas Act, 15 U.S.C. 717d(a), provides:

Fixing rates and charges; determination of cost of production or transportation

Decreases in rates

Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

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